



**House
Legislative
Analysis
Section**

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SAND DUNES PROTECTION

House Bill 4296 as passed by the House
Second Analysis (5-2-89)

RECEIVED
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Sponsor: Rep. H. Lynn Jondahl
Committee: Conservation, Recreation & Environment

Mich. State Law Library

THE APPARENT PROBLEM:

Sand dunes are one of the state's most valuable resources. They are irreplaceable, fragile resources and home to many rare ecological wonders. However, continued mining of the dunes coupled with increased recreational use and commercial development have led to a dramatic decrease in the number of dunes in the state. Some dunes have virtually disappeared while others have suffered irreparable damage. In addition, because there is not careful regulation of residential development in dune areas, property damage has also occurred to homes built on dunes. A Natural Resources Commission study initiated in 1984 found that the dunes are not managed in a comprehensive manner and that local zoning ordinances to protect the dune areas are not consistent. Since the dunes are interconnected sand formations, inconsistent levels of protection will eventually lead to the depletion of sand dune resources. Legislation has been introduced in both the House and Senate (Senate Bill 179) to ensure consistent regulation of dune areas by the adoption of minimum protection standards in a comprehensive zoning ordinance.

THE CONTENT OF THE BILL:

The bill would amend the Sand Dune Protection and Management Act, extending regulation to non-mining uses of sand dunes and critical dune areas, and limiting permits for new mining sites.

Notification of Critical Dune Area Designation. Within 90 days of the effective date of the bill, the director of the Department of Natural Resources (DNR) would be required to notify each person who owned property within dunes designated in the Atlas of Proposed Critical Dune Areas (dated February 1989) or a local unit of government that had dunes designated in the atlas within its jurisdiction that the DNR had designated the property as critical dune areas that were subject to interim regulation and permanent regulation under the bill and that the local unit of government could either adopt an approved critical dune area zoning ordinance or the use of the critical dune area would be regulated under the Commission of Natural Resources' critical dune area plan.

A property owner who received notice could not sell any interest in the property before he or she provided written notice to the purchaser that the property contained a critical dune area that could be regulated by the commission's critical dune area plan or by a critical dune area zoning ordinance. A contract or sale entered into in violation of the bill would be voidable at the option of the purchaser.

Critical Dune Areas. Within one year of the effective date of the bill, the director of the Department of Natural Resources (DNR) would be required to submit rules to the Joint Committee on Administrative Rules to designate certain areas of the state as critical dune areas essential to the integrity of a critical dune area designated in the

Atlas of Proposed Critical Dune Areas. The bill would define critical dune areas to mean the following:

- a geographic area designated in the Atlas of Proposed Critical Dunes dated February 1989 as prepared by the department because it had barrier dunes, areas supporting exemplary dune-associated plant communities as identified by the Michigan Natural Features Inventory within the boundaries of a sand dune area, or it had areas composed primarily of dune sand or dune-associated sands as identified in the United States Department of Agriculture Soil Survey which were contiguous to the Great Lakes shoreline and exhibited dune-like characteristics in terms of topography and vegetation, including dunes at least 20 feet in height (for areas without soil surveys, the landward boundaries of these areas would be demarcated by a marked change in topography, or where this change was not evident, a change in soil type);
- a geomorphic feature designated by the Department of Natural Resources in a rule as being essential in terms of hydrology, ecology, or topography to the integrity of a critical dune area designated in the Atlas of Proposed Dune Areas (the area so designated by the department could not extend more than 1,000 feet from the landward boundary of the critical dune area designated in the atlas).

Within 60 days of the development of the rules submitted to the Joint Committee on Administrative Rules the bill would require the director of the DNR to notify each local unit of government that had critical dune areas within its jurisdiction and each owner of property in the critical dune areas as detailed above.

Within one year of the effective date of the bill the DNR would also be required to make a comprehensive study that would include a summary of existing and suitable critical dune area land uses and the regulatory criteria and land use standards that should apply to the different classifications or critical dune areas, and other information critical for effective dune management. The bill would require the director to solicit position statements from local units of government and to provide public notice to allow persons interested to file written opinions or position statements. In addition, the director would be required to submit a copy of the notice to the Legislative Service Bureau for publication in the Michigan Register.

Interim Regulation of Critical Dune Areas. Following mailing of the notice of designation of critical dune areas to local units of government and property owners and until a local unit of government zoning ordinance was approved by the Commission of Natural Resources or a commission zoning plan was adopted, a person proposing any new use within a critical dune area would be required to obtain a permit from the director, unless the local unit of government in which a proposed use was to be located elected to process applications and issue permits during the interim period. The bill would require a local unit of

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government that elected to issue permits during the interim period to notify the department of its decision and to enact an interim ordinance that was at least as restrictive as interim regulatory requirements set forth in the bill. If the governing body of a local unit did not elect to issue permits during the interim period, the director of the DNR would process applications for permits subject to the same procedures, time constraints, and criteria applicable to local units.

Following passage of an enabling ordinance, a local unit of government could issue permits during the interim period. A person proposing any use within a critical dune area would file an application with the local unit of government including any information that may be necessary to conform with the requirements of the bill (one application could be filed for projects proposing the use of more than one critical dune area location within a local unit of government). The local unit of government could hold a public hearing on pending applications. Notices sent to persons requesting local units of government for notification of pending applications would state that unless a written request was filed with the local unit of government within 20 days after the notice was mailed, the local unit of government could grant the application without a public hearing. The local unit of government would be required to hold a public hearing pertaining to a permit application upon the written request of two or more persons that own real property within the jurisdiction of the local unit or that resided within the jurisdiction of the local unit.

After the filing of an application, the local unit would grant or deny the permit within 60 days, or within 90 days if a public hearing was held. When a permit was denied, the local unit of government would provide to the applicant a concise written statement of its reasons for denial of the permit, and if it appeared that a minor modification of the application would result in the granting of the permit, the nature of the modification would be stated. The local unit would be prohibited from permitting a use that did not comply with the minimum setback requirements required by rules developed under the Shorelands Protection and Management Act unless a special exception had been granted according to that act. Local units would also be prohibited from permitting any of the following uses within a critical dune area:

- a use that was lakeward of a minimum setback (100 feet measured landward from the crest of the first landward ridge of a barrier dune that was not a foredune);
- a use on any slope that was greater than 25 percent;
- a use involving a contour change that was likely to increase erosion, decrease stability, or was more extensive than required to implement a use for which a permit was requested;
- silvicultural practices, as described in the "Voluntary Forest Management Guidelines for Michigan" prepared by the Society of American Foresters in 1987, that are likely to increase erosion, decrease stability, or are more extensive than requirements to implement a use for which a permit was requested;
- a use that involved a vegetation removal that was likely to increase erosion, decrease stability, or was more extensive than required to implement a use for which a permit was requested;
- a use that was not in the public interest, considering the benefit to be derived from the proposed use balanced against the reasonably foreseeable detriments of the use, and considering the availability of alternative locations

and methods to accomplish the expected benefits, and the impact to the critical dune area. If a proposed use was a single family dwelling on a lot owned by the applicant, consideration of feasible and prudent alternative locations would be limited to the lot on which the use was proposed. However, a lot could not be created in order to avoid consideration of alternative locations.

The bill would allow local units to establish an interim permit and inspection fee. The interim regulatory system would be implemented for dunes designated in the Atlas of Proposed Critical Dune Areas (dated February 1989) without regard to when rules designating areas of the state as critical dune areas were promulgated. However, when rules were promulgated, the interim regulatory system described in the bill would be implemented for those critical dune areas that were defined in the rules. Local units could grant variances from certain critical dune area use restrictions, subject to the following provisions:

- Variances could not be granted from a setback requirement unless the property for which the variance was requested was a nonconforming lot of record that was recorded prior to the effective date of the bill, a lot legally created after the effective date of the bill that later became nonconforming due to natural shoreline erosion, or property on which the base of the first landward critical dune of at least 20 feet in height, that was not a foredune, was located at least 500 feet inland from the first foredune crest or line of vegetation on the property. However, the setback would be a minimum of 200 feet measured from the foredune crest or line of vegetation;
- Variances could not be granted that authorized construction of a dwelling or other permanent building on the first lakeward facing slope of a critical dune area or a foredune unless the construction was near the base of the lakeward facing slope of the critical dune on a slope of less than 12 percent on a nonconforming lot that was recorded prior to the effective date of the bill which had borders that lay entirely on the first lakeward facing slope of the critical dune area that was not foredune. If a local unit granted a variance under these conditions, the local unit would be required to submit the proposal to the department. If the department found that the determination was contrary to the bill, the department could deny the request within 60 days of submittal.
- Variances would not be granted unless a local unit of government found that there were conditions regarding the site that indicated both that unreasonable hardship would occur to the owner of the site if a variance was not granted and the granting of the variance was consistent with the bill. A local unit would be required to maintain its records pertaining to a variance for a single family dwelling for five years. The records would be available to the DNR upon request. If a proposed industrial or commercial development or multi-family dwelling required rezoning or approval of a site plan by a local unit of government, the local unit would submit the proposal to the department. The department would review the proposal and would provide comments to the local unit within 45 days after receiving the proposal.

The local unit would consider the comments and notify the department of its decision. If the DNR determined that a local unit's decision was contrary to the act, the department could issue, modify or deny the request within 90 days after reviewing the local unit's decision. If the department granted interim permits for a new use within a critical dune

area, the department could grant variances from a critical dune use restriction under the same circumstances the variances would be granted by local units.

Model Regulatory Criteria and Land Use Standards. Within two years after the effective date of the bill, the director of the DNR would be required to submit rules to the Joint Committee on Administrative Rules that established model regulatory criteria and land use standards for critical dune areas which could be incorporated in ordinances of local units as provided for in the bill. The director would provide representatives of local units and other interested parties the opportunity to participate in the development of model regulatory criteria and land use standards. The rules would be applied by the Commission of Natural Resources to formulate a plan to regulate critical dune area use in the absence of an approved local ordinance. The rules could not permit any of the uses prohibited in the interim regulatory system. The rules would include circumstances under which residential, commercial, industrial, recreational and tourism use and other physical alterations could occur and circumstances under which the use of an area would be restricted.

Before the processing of a rule, the bill would require the director to form an advisory group of persons who represented interests that the director determined could reasonably be expected to be affected by the proposed rules. The advisory group would include representatives from the following groups:

- the public;
- the Michigan Townships Association;
- the Michigan Municipal League;
- a conservation organization;
- an environmental protection organization;
- land development interests; and
- construction industry interests.

The bill would require the department to notify members of the advisory group of the rule making and would summarize unresolved issues raised during advisory group meetings. Advisory group members would not receive compensation for their participation.

Zoning a Critical Dune Area. Following promulgation of rules, the bill would allow a local unit to formulate a plan (at any time) according to the rules to zone a critical dune area within its jurisdiction. A zoning plan of a local unit of government that was approved by the Commission of Natural Resources would take the place of a commission plan adopted for that local unit of government.

A local unit of government could issue a variance from a requirement of a zoning ordinance subject to the same conditions that variances for permits are issued.

Zoning ordinances, and modifications of existing ordinances, that regulated critical dune area uses would be submitted for approval or disapproval to the Commission of Natural Resources, and the commission would make its decision within 120 days of receipt of the ordinance. Ordinances would provide at least the same level of protection for critical dune area uses provided for in the commission rules. A new or modified ordinance that was approved by the commission would be given immediate effect. Any proposed modification of a previously approved ordinance would be resubmitted to the commission for review and would be processed in the same manner. The DNR would be required to assist local units in developing zoning ordinances that met the requirements of the bill.

The department would periodically review the performance of all local units of government that had ordinances approved under the bill. If the department determined that the local unit was not administering the ordinance in conformance with the bill, the department would notify the unit, including reasons for its determination, and require action within 30 days. The director would withdraw approval of the ordinance if the local unit had not made sufficient changes to its ordinance administration. Upon withdrawal of approval, the commission would be required to adopt a critical dune area zoning plan, and the department would assume authority for regulating use of critical dune areas within the jurisdiction.

The bill would allow local units to adopt a critical dune area zoning ordinance within one year following the promulgation of rules. If a local unit failed to adopt a critical dune area zoning ordinance the commission would adopt a critical dune area zoning plan for that unit. The plan would be developed in accordance with commission rules regulating critical dune areas. The bill would allow the commission to develop rules providing for the granting of special exceptions under the same circumstances that variances for permits would be granted. The bill would require the commission to use its rules to develop site specific local plans. Before a zoning plan was adopted by the commission, the director of the DNR would take action to ensure public comment regarding the plan.

Upon adoption of a commission critical dune area zoning plan, the plan would be in effect in the critical dune areas covered by the plan. Prior to commencing any use of a critical dune area, a person would be required to obtain a permit from the DNR for the proposed use. Within 60 days of the development of rules submitted to the Joint Committee on Administrative Rules, the director of the DNR would be required to establish permit application and review procedures necessary to implement the bill. The director would make a decision on a permit application within 60 days of receipt of a completed application or within 90 days if a public hearing was held.

Upon adoption of a critical dune area zoning ordinance by local unit or upon adoption of a commission plan, certified copies of the maps showing critical dune areas, existing development and uses, and restrictions on use would be filed by the director with the State Tax Commission and the assessing office, planning commission, and governing board of the local unit of government.

Nonconforming Uses of Land or Structures. The lawful use of land or a structure within a critical dune area at the time a commission plan was adopted could continue although the use of the land or structure did not conform to the provisions of the plan. The commission would provide in the plan for the continuance, completion, restoration, reconstruction, extension, or substitution of existing nonconforming uses of land or a structure upon reasonable terms. Different classes of nonconforming uses could be established in the plan with different regulations applicable to each class. The lawful use of land or a structure within a local unit of government that had a critical dune area zoning ordinance approved by the commission could continue subject to the provisions of current zoning laws pertaining to existing uses of land or structures. A state-owned land located within a critical dune area would be managed and administered according to the bill and rules promulgated under the bill. A use that was needed to obtain or maintain a permit or license required by law to continue operating an electric utility

generating facility in existence on the effective date of the bill would not be precluded under the bill. The development of single family dwellings that have been specifically approved by the state, and by the local unit of government in which the use was located, would be exempt from the operation of the bill or local ordinances approved by the commissioner, and would be regulated according to ordinances that were in effect prior to the effective date of the bill if approval for the development had been secured by the applicant prior to April 1, 1989 and construction commenced within 18 months of the effective date of the bill.

Except as provided in the preceding section, the bill would prohibit a surface drilling operation that was utilized for the purpose of exploring for (or producing) hydrocarbons or natural brine, or for the disposal of the waste or by-product of the use of a critical dune area. The bill would also prohibit production facilities regulated under the Mineral Well Act in a critical dune area, except as provided in the preceding section. However, uses which were lawfully in existence at a site when the site became subject to the bill could be continued. The continuance, completion, restoration, reconstruction, extension, or substitution of the existing uses would be permitted upon reasonable terms described by the director of the DNR.

Permit and Inspection Fees. The bill would allow local units or the Commission of Natural Resources to establish a use permit and inspection fee. The fee could not exceed the costs of inspection and the costs of processing an application for a permit. Fees collected by the commission under the bill would be deposited in the state treasury and credited to the general fund to be used to defray the costs of administering the sections of the bill that did not pertain to sand dune mining. Fees collected by a local unit of government would be credited to the treasury of the local unit to be used to defray the cost of administering uses under the bill. A local unit or the director of the DNR could require the holder of a permit granted under the bill to file a bond with the director of the DNR which was executed by an approved surety in the state in an amount necessary to assure faithful conformance with the permit.

Penalties. If the director found that a person was not in compliance with the bill, the rules developed under the bill, or a provision of a permit issued under the bill, the director could suspend or revoke the permit. At the request of the director or any person, the attorney general could institute an action for a restraining order, injunction, or other appropriate remedy to prevent or preclude a violation of a permit, the bill or its rules, or a critical dune area zoning ordinance. This provision would be in addition to rights currently provided in the Environmental Protection Act. An action taken by the attorney general's office could be instituted in the circuit court of Ingham County or in the county in which the defendant was located, resided or was doing business. In addition to any other relief provided by the bill, the court could impose on a violator a civil fine of not more than \$5,000 per each day of violation or order a violator to pay the full cost of restoration (or replacement) of any critical dune area (or other natural resource) that was damaged or destroyed as a result of a violation, or both. For uses other than sand dune mining, this provision would not take effect until 30 days after DNR notification of local governments and property owners concerning critical dune areas had occurred as specified in the bill.

Acquisition of Interests in Lands in Critical Dune Areas. The commission or local units could acquire lands or interests in lands in critical dune areas for the purpose of

maintaining or improving the critical dune areas and its environment in conformance with the purposes of the commission rules. Interests that could be acquired could include easements designed to provide for the preservation of critical dune areas and to limit or eliminate development in critical dune areas.

Taking Private Property. The bill would prohibit the taking of private property for public use without just compensation being made to the owner. The bill would allow owners of private property to file an action for the purpose of determining if private property had been taken for public use without just compensation being made. If the court determined that an action of the DNR under the bill had resulted in taking private property without just compensation being made, the court could award reasonable attorney's fees, costs, and disbursements, and would order the department to do one or more of the following:

- compensate the property owner for the full amount of the lost value;
- purchase the property in the public interest as determined as if its value had not been affected by the bill or the department's action (or inaction) under the bill;
- modify its action (or inaction) with respect to the property so as to minimize the detrimental effect to the property's value.

Other Provisions. Sand dune mining would continue under present law, although limits would be placed on new mining sites. The zoning provisions of the bill would not apply to land now under sand dune mining permits, but the DNR would be prohibited from issuing sand dune area mining permits within a critical dune area after the bill took effect unless the operator sought to renew or amend a sand dune mining permit that had been issued before the bill took effect, or the operator already had a mining permit and was seeking a permit for adjacent land which he or she owned (or owned rights in) before the effective date of the bill.

Under the act, operators are required to pay a fee for surveillance, monitoring, administration and enforcement of the act. The bill would specify that funds collected by fee assessment would not exceed actual costs to the department of implementing the sections of the Sand Dune Protection and Management Act that pertained to sand dune mining. The bill would also specify that penalties paid for late payment of the fees would be used for the implementation, administration, and enforcement of the sections of the act that pertained to sand dune mining. The bill would repeal a redundant section of the act.

MCL 281.652 et al.

FISCAL IMPLICATIONS:

The Department of Natural Resources estimates that the bill would cost approximately \$200,000 for staff and studies to implement the bill. However, this estimate does not take into account the possibility that communities will not take regulation under their control. (4-17-89)

ARGUMENTS:

For:

Coastal sand dunes are a rare resource of the state and deserve the protection and care of its citizens. The bill is part of the governor's efforts to improve state policies that affect coastal dunes by regulating acceptable dune uses

and prohibiting unacceptable uses. The dunes are one of the major tourist attractions in the state. If the state effectively protects this resource it will increase tourist attraction to the state and development of jobs in industries serving tourists. The bill will help ensure effective protection of the state's coastal dunes. In addition, the bill will also protect property owners' investments in dune areas.

Against:

As the bill is currently written, it will encourage property owners to seek compensation when the state takes private property by requiring courts to award reasonable attorney's fees, costs and disbursements if the courts found that an act of the DNR did result in the taking of private property for public use. The language allowing property owners to seek "just compensation" for the taking is not needed since it can already be found in the U.S. Constitution. Further, if this language is necessary, it should also be included in other Michigan laws addressing the taking of land for public use (such as the Wetland Protection Act).

Response: No matter what language is used in the bill, some property owners will seek judicial relief. At this writing, few if any cases involving the state taking private property have ever been decided in favor of property owners. However, small landowners should have access to the courts just as do large developers. The bill would provide small landowners accessibility to the courts while also giving the court three options of action to curtail endless litigation.

Against:

The bill does not provide property owners with adequate remedies at law to address the denial of use of property. The bill would prohibit certain uses of land if there were feasible and prudent alternative locations and methods to accomplish the benefits expected from the use. Therefore, it would be difficult, if not impossible, for a landowner to prove that a taking of private property had occurred if a local unit found feasible and prudent alternatives for use of the land. Thus, the bill effectively prohibits litigation from private property owners concerning the taking of private property; local units will likely find alternatives to land use before admitting to a taking of private property. Further, a March 10, 1989 memo opinion of the attorney general concerning the taking issue in regards to the proposed sand dunes legislation interprets the language to mean that if a landowner can reap any economically viable use of the land in question, a taking would not have occurred. Although a local unit may find a feasible and prudent alternative to land use in a dune area, and a property owner may gain some sort of economically viable use of land that fails under the regulatory constraints of the bill, it is likely that a property owner who has invested a life's savings in the purchase of land with the intent of building a retirement home in a dune area or with some other specific use in mind may find the proposed alternative unacceptable.

Response: It has been suggested that the bill simply prohibit exceptions and alternatives to land use within critical dune areas. However, instead of complete denial of certain uses on certain property, the bill provides for safe alternative uses and promotes a spirit of cooperation between landowners and local units in order to protect the integrity of the dunes. Further, in cases where a proposed use was a single family dwelling, the consideration of feasible and prudent alternatives would be limited to the

lot on which a dwelling was originally intended to be located.

Against:

The Atlas of Proposed Critical Dune Areas is not the appropriate document needed to site critical dune areas and does not specifically designate the areas to be controlled. Reportedly, the maps used in the atlas were maps documented twelve years ago to designate barrier dunes in the sand dune mining act. The sand dune areas have changed since then, and the maps are obsolete. If updated maps were used to accurately designate critical dune areas, there would be no need for the director of the Department of Natural Resources to designate 1000 foot buffer zones. In addition, the original maps did not contain property boundaries (metes and bounds), so the director will have difficulty determining which property owners to notify regarding the designation of critical dune areas in accordance with the bill.

Response: The department maintains that the atlas is the appropriate tool to use to designate critical dune areas. It is in the process of acquiring tax roll maps for each county in which critical dune areas are located, overlay the tax roll maps, thereby allowing the department to determine the property owners within critical dune areas.

Against:

The bill would usurp local zoning authority. Under the bill, the DNR would have the power to overrule local units concerning development in certain dune areas, and local units would not be included in the process to set standards and criteria for acceptable uses of the dunes. Local units are aware of the delicate nature of the dunes and feel that they should be a part of the decision making process affecting the dunes in their area.

Response: The bill would allow local units to submit position statements to the department related to the characteristics and use of critical dune areas within or adjacent to their areas of jurisdiction. This provision would allow local units ample input into the development of critical dune use standards and criteria.

Against:

The bill requires the director of the DNR to submit rules to the Joint Committee on Administrative Rules to develop model regulatory criteria and land use standards for critical dune areas. Before the processing of a rule, the director must form an advisory group that represents interests that would be affected by the proposed rules. However, advisory groups would not include representatives of the interests of private property owners.

Response: The bill does provide for the inclusion of a member of the public on advisory groups. It is quite likely that the member representing the public would be a private property owner and represent private property owner interests.

POSITIONS:

The governor's office supports the bill. (4-12-89)

The Department of Natural Resources supports the bill. (4-17-89)

The Michigan Association of Counties supports the bill. (4-12-89)

The Michigan Environmental Council supports the bill. (4-28-89)

The Michigan Recreation and Parks Association supports the bill. (4-28-89)

The Michigan Townships Association supports the bill. (4-28-89)

The Michigan United Conservation Clubs strongly supports the bill. (4-28-89)

The Sierra Club - Mackinac Chapter supports the bill. (4-28-89)

The Michigan Association of Home Builders is neutral on the bill. (5-2-89)

The Michigan Association of Realtors recognizes the need for dune management but would prefer more clarification of the bill's provisions. (4-28-89)

The Michigan Municipal Electric Association takes no position on the bill. (4-28-89)

The Michigan Oil and Gas Association takes no position on the bill. (4-28-89)

The Consumers Power Company does not oppose the bill. (4-28-89)